



Iowa General Assembly

2008 Legal Updates

Legislative Services Agency – Legal Services Division

http://www.iowacourts.gov/Supreme_Court/Recent_Opinions/20071130/06-1074-Nov%2030.pdf

Purpose. Legal update briefings are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update briefing is intended to inform legislators, legislative staff, and other persons interested in legislative matters of recent court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although a briefing may identify issues for consideration by the General Assembly, a briefing should not be interpreted as advocating any particular course of action.

IOWA INDIAN CHILD WELFARE ACT - IOWA SUPREME COURT RULINGS

In the Interest of A.W. and S.W., Minor Children, WOODBURY COUNTY ATTORNEY and A.W. and S.W., MINOR CHILDREN vs. IOWA
November 30, 2007

http://www.iowacourts.gov/Supreme_Court/Recent_Opinions/20071130/06-1074-Nov%2030.pdf

In the Interest of N.V. and P.V., Minor Children v. State of Iowa No. 18/07-0583

February 15, 2008

http://www.judicial.state.ia.us/Supreme_Court/Recent_Opinions/20080215/07-0583.pdf

In the Interest of N.N.E., Minor Child, TYME MADIU TRIBE OF THE BERRY CREEK RANCHERIA

June 13, 2008

http://www.iowacourts.gov/Supreme_Court/Recent_Opinions/20080613/07-0123.pdf

Overview. Congress enacted the Indian Child Welfare Act (federal ICWA) in 1978 (see 25 U.S.C. §§1901-1963) and the Iowa General Assembly enacted the Iowa Indian Child Welfare Act (Iowa ICWA) in 2003 (see Code Chapter 232B). Both laws include public policy statements outlining public policy goals of protecting the best interest of an Indian child and the tribal relationship with the child. In recent months, the Iowa Supreme Court issued three rulings interpreting the Iowa ICWA and two of these rulings found portions of the Iowa ICWA to be unconstitutional. The shortened references to the three rulings addressed by this legal update indicate the initials of the children affected by each ruling: A.W. and S.W., N.V. and P.V., and N.N.E.

General Background. Each of the three rulings relate to proceedings for termination of parental rights; two rulings began with a child in need of assistance (CINA) proceeding, and all three rulings addressed questions as to the application of both the federal ICWA and the Iowa ICWA. The rulings affect different parts of the Iowa ICWA:

A.W. and S.W.—Indian Child Definition Unconstitutional.

- **Background Facts.** The Iowa ICWA defines an "Indian child" as "a child who is under 18 years of age that an Indian tribe identifies as a child of the tribe's community." The two children were temporarily removed from the home based on a history of parental substance abuse. Subsequently, a CINA petition was filed. The Winnebago Tribe of Nebraska filed a motion to intervene in the CINA proceeding alleging the children were Indian children under the Iowa ICWA definition. The children have one-eighth degree Winnebago Tribe blood through their father while the tribal constitution requires at least one-fourth degree Winnebago Tribe blood for tribal membership. The Woodbury County Attorney and the children's guardian ad litem resisted the motion, contending the Iowa ICWA is unconstitutional among other grounds. The juvenile court adjudicated the children as CINA and scheduled a hearing on the tribe's right to intervene but when the tribe did not appear or present evidence, the juvenile court ruled that the Iowa ICWA was inapplicable. When a petition was filed seeking termination of parental rights, notice of the petition was served on the tribe and the juvenile court held another hearing on the tribe's right to intervene. The juvenile court ruled that the Iowa ICWA definition was applicable to the children and was constitutional and allowed the tribe to intervene. The county attorney and the guardian ad litem appealed, challenging the constitutionality of the statute, and the Attorney General moved to dismiss the county attorney from the appeal.
- **Analysis.** The Iowa Supreme Court (Court) reasoned that the Iowa ICWA's definition of "Indian child" expands the scope beyond the group of children addressed by the federal ICWA. The ruling explains there are "ethnic" Indian children who have some Indian blood but who are not members or eligible for membership in an Indian tribe and

there are "tribal" Indian children who are either members of or eligible for membership in an Indian tribe. The constitutionality of the tribal Indian classification has been upheld by a number of U.S. Supreme Court and lower court decisions. Invoking strict scrutiny, the Court found that inclusion of ethnic Indian children under the Iowa ICWA's definition constitutes a racial classification that is over-inclusive and therefore violates equal protection principles.

The Court noted that A.W. and S.W. were not eligible for membership in the Winnebago Tribe, and nothing in the record indicated the children had any relationship to the tribe or traditional tribal society. By classifying children such as A.W. and S.W., who do not meet the requirements, as tribal Indian children, any party instituting CINA or termination of parental rights proceedings would be burdened by requirements that are not applicable in similar proceedings affecting non-Indian children. In addition to finding that the Iowa ICWA definition of Indian child in Code Section 232B.3(6) violates the Equal Protection Clause of the U.S. Constitution, the Court found that the definition violates the equality provision in Article I, Section 6 of the Iowa Constitution.

N.V. and P.V.—Timing of Jurisdiction Transfer Petition Constitutional.

- **Background Facts.** The parents, who were incarcerated at the time of the CINA hearing, did not contest the adjudication of the children in November 2005 as CINA and the placement of the children with a relative who is a licensed foster parent. In March 2007 the Court held a termination of parental rights hearing at which the mother and father requested that the Court transfer jurisdiction to the tribal court. The Court considered briefs on the question and granted the request for transfer of jurisdiction to the tribal court. The state appealed, raising, among other issues, whether the Court could deny an "11th hour" appeal.
- **Analysis.** The Court ruled that Code Section 232B.5(10) requires the Court to transfer jurisdiction to a tribal court upon petition from certain parties except when certain circumstances constitute good cause. The timing of the request is not one of the good cause circumstances listed in the law. The Court further found that when the Iowa ICWA was enacted, Bureau of Indian Affairs nonbinding guidelines for such cases based on the federal ICWA available for consideration by the General Assembly included both hardship and timeliness factors. The Iowa ICWA includes a hardship component but not the timeliness component. The Court found that the General Assembly did not intend to put a time limit on the parties to make the request and rejected the timeliness argument.

The Court affirmed the district court's ruling transferring jurisdiction of the CINA case to the tribal court. The Court also noted that the stated purpose of the Iowa ICWA contained in Code Section 232B.2, is to ensure that Indian children can be placed in homes that reflect the unique values of the child's tribal culture and to assist the child in establishing relationships with the child's tribe and tribal community.

N.N.E.—Preferred Placement Requirements Unconstitutional.

- **Background Facts.** In this case, the mother, 20, who is a member of a federally recognized Indian tribe located in California, but she lived in Sioux City. She decided to voluntarily give the child up for adoption. She chose a non-Indian family from Arizona to adopt the child. Custody of the child was released to a Sioux City attorney, the child was placed with the Arizona couple, a petition for termination of the mother's parental rights was filed, and notice, including information on the mother's placement wishes, was sent to the tribe after the court certified the petition. The tribe moved to intervene, claiming that the child was eligible for tribal membership, that both the federal and the Iowa ICWA requirements had been violated, and that the tribe intended to exercise its right to preferred placement under the Iowa ICWA. After several continuances, the juvenile court held a hearing and subsequently issued an order for termination of parental rights, finding that the termination conformed with the requirements of Iowa law and both the federal and the Iowa ICWAs. The tribe appealed, arguing the juvenile court erred on those findings as well as several procedural matters.
- **Analysis.** The Court examined the differences between the federal and the Iowa ICWAs, noting that the federal law allows the Court to deviate for good cause from preferences for making adoptive placement of an Indian child with extended family, other tribal members, or other Indian families. Various court rulings were cited where courts in other jurisdictions under the federal ICWA found the parent's desire in a voluntary termination of parental rights for placement of the child with a non-Indian family to constitute good cause.

Along with placement preferences similar to those in the federal ICWA, the Iowa ICWA provides lower priority preferences for placement of an Indian child with a non-Indian family approved by the tribe or one committed to enabling the child to have significant tribal contact. The Iowa ICWA does not allow deviation from the placement preferences unless there is clear and convincing evidence that the placement within the preferences would be "harmful" to the Indian child.

The Court found that requiring such a high burden to deviate from the preferences violates substantive due process. Previous Court rulings have recognized a fundamental right to parent under the Iowa Constitution and have stated that an infringement on that right "must be narrowly tailored to serve a compelling state interest." In this case, the Court found that the statute's infringement of that parental right was not narrowly tailored, as it makes the rights of the tribe paramount to those of the parent, even when the parent has no connection to the reservation and has not been deemed unfit to parent. The Court found that since the Iowa ICWA placement preferences are

unconstitutional, the case was remanded to the juvenile court to determine whether good cause exists to deviate from the placement preferences under the federal ICWA.

N.E.E.—Other Issues. The Court ruled on other issues involving implementation of the Iowa ICWA, including the following:

- **Notice to Tribe.** The tribe contended that the mother signing a release of custody constituted a child custody proceeding and the tribe should have been notified. The Court disagreed, ruling that the notice requirement is triggered upon the filing of a petition for termination of parental rights.
- **Pro Se Representation.** The tribe contended that the juvenile court erred by not allowing a non lawyer to represent the tribe at a hearing. The Court agreed, holding that a non lawyer tribal member authorized to speak on behalf of the tribe may represent the tribe in ICWA proceedings.
- **Telephonic Representation.** The tribe contended the juvenile court erred by refusing to allow the tribe to participate in a hearing via telephone. The Court found that the juvenile court had the discretion to deny the request because it was not timely made but encouraged juvenile courts to allow tribes to participate by telephone, particularly when the tribe is located out of state.

Conclusion. The Court has found two parts of the Iowa ICWA to be unconstitutional: the definition of "Indian child" in Code Section 232B.3(6) and the placement preferences applicable to a voluntary termination of parental rights in Code Section 232B.9(6). The Court noted in N.E.E. that these placement preferences are also provided under the Iowa ICWA for emergency removal, foster, and preadoptive placements but the decision did not address those placements. The General Assembly could consider corrective legislation to address the rulings.

LSA Contact: John Pollak, Legal Services, (515) 281-3818.